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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

MAGDALY ORTIZ-MORALES,)	No. C 07-4759-WHA
Petitioner,)	
v.)	
MICHAEL CHERTOFF; DAVID STILL,)	RESPONDENTS' OPPOSITION TO
NANCY ALCANTAR; EDDIE)	PETITION FOR WRIT OF HABEAS
ROBINSON,)	CORPUS
Respondents.)	Date: October 11, 2007
)	Time: 8:00 a.m.

I. INTRODUCTION

The petitioner, Magdaly Ortiz-Morales, is a native and citizen of Honduras who has filed a document styled "Petition for Writ of Habeas Corpus and Appeal on Motion to Re-Open Pre-1992 In-Absentia Order." The respondents hereby submit their opposition.

II. FACTUAL AND PROCEDURAL HISTORY

The petitioner is a native and citizen of Honduras who was ordered deported by an Immigration Judge *in absentia* on November 1, 1989. Declaration of Yakov Grinberg ¶ 2. The petitioner did leave the country as directed and, accordingly, the United States Immigration and Customs Enforcement (ICE) arrested the petitioner on January 17, 2007. *Id.* at ¶ 3. The petitioner is currently being detained at ICE's behest at the Santa Clara Jail. *Id.* at ¶ 4.

1 While in detention, the petitioner filed a motion to reopen her deportation proceedings with the
 2 Immigration Judge, alleging that she did not receive notice of her deportation hearing. *Id.* at 5.
 3 The Immigration Judge denied the motion to reopen on April 9, 2007. *Id.* at 6. The Board of
 4 Immigration Appeals (BIA) affirmed the Immigration Judge's denial of the motion to reopen on
 5 June 21, 2007. *Id.* at 7. The petitioner filed a petition for review with the United States Court of
 6 Appeals for the Fifth Circuit, and the Fifth Circuit has denied the petitioner's motion for a stay of
 7 deportation on August 15, 2007. *Id.* at 8; Habeas Petition at Exhibit 6.

8 The petitioner also filed a motion to reconsider with the BIA, asking the BIA to reconsider its
 9 June 21, 2007 decision. *Id.* at 9. On September 7, 2007, the BIA denied the petitioner's motion to
 10 reconsider. *Id.* at 10.

11 The ICE was set to remove the petitioner to Honduras on July 13, 2007, but was prevented
 12 from doing so in light of the stay of deportation that was then in effect due to the petitioner's
 13 challenge to her *in absentia* deportation order. *Id.* at ¶ 11. There is no longer a stay of deportation
 14 in effect and the ICE has asked the Honduran Embassy to re-new the petitioner's travel document
 15 (which facilitates an alien's removal from the United States) and intends to remove the petitioner
 16 to Honduras imminently. *Id.* at ¶ 12; Attachment to this Opposition.¹

17 III. DISCUSSION

18 A. This Court Lacks Jurisdiction To Review The Petitioner's Challenge To Her 19 Deportation

20 The REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, which became effective
 21 on May 11, 2005, eliminated district court habeas jurisdiction over orders of removal and vested
 22 the United States Courts of Appeals with exclusive jurisdiction to review an alien's removal order.
 23 *See Puri v. Gonzales*, 464 F.3d 1038, 1041 (9th Cir. 2006); *Martinez-Rosas v. Gonzales*, 424 F.3d
 24 926, 928-29 (9th Cir. 2005). As amended by section 106(a) of the REAL ID Act, 8 U.S.C. §
 25 1252(a)(5) now provides:

26
 27 ¹The respondents have, however, agreed not to remove the petitioner prior to October 19,
 28 2007, in order to give this Court an opportunity to review and resolve the petitioner's habeas
 petition.

1 Notwithstanding any other provision of law (statutory or nonstatutory), including
2 section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and
3 1651 of such title, a petition for review filed with an appropriate court of appeals in
4 accordance with this section shall be the sole and exclusive means for judicial
5 review of an order of removal entered or issued under any provision of this chapter,
6 except as provided in subsection (e).

7 8 U.S.C. § 1252(a)(5); *Martinez-Rosas*, 424 F.3d at 929 (“Under the new judicial review regime
8 imposed by the Act, a petition for review is now the exclusive means for challenging final removal
9 orders by the BIA, except those issued pursuant to 8 U.S.C. § 1225(b)(1)².”).

10 Moreover, the REAL ID Act is retroactive, meaning that it applies to any “final administrative
11 order of removal, deportation, exclusion” that was issued “before, on, or after the date of
12 enactment of this division.” Section 106(b) of the REAL ID Act of 2005, Pub. L. No. 109-13, Div.
13 B, 119 Stat. 231, 311; *Martinez-Rosas*, 424 F.3d at 929 (“Section 106(b) further provides that the
14 amendments made by subsection (a) apply retroactively.”).

15 Here, the bulk of the petitioner’s habeas petition is devoted to a challenge of her deportation
16 order, the Immigration Judge’s denial of her motion to reopen her deportation order, and the BIA’s
17 orders affirming the denial of her motion to reopen her deportation order and denying her motion
18 to reconsider. Under the REAL ID Act, the only venue available to the petitioner to challenge her
19 deportation order is the appropriate United States Court of Appeals, via a petition for review. The
20 petitioner is currently pursuing this avenue of relief in the United States Court of Appeals for the
21 Ninth Circuit. *See* Declaration of Yakov Grinberg at Exhibit E (the Fifth Circuit’s docket sheet in
22 *Ortiz-Morales v. Gonzales*, 5th Circuit Appeal No. 07-60545). The Fifth Circuit has denied the
23 petitioner’s motion for a stay of deportation. Habeas Petition at Exhibit 6.

24 Because the REAL ID Act eliminated district court habeas jurisdiction over orders of
25 deportation, exclusion, and removal, the respondents respectfully ask this Court to dismiss the
26 portion of the habeas petition that challenges the petitioner’s removal from the United States.

27 ²8 U.S.C. § 1225(b) is a provision that governs expedited removal of aliens, which has no
28 application to this case.

B. The Length of the Petitioner's Detention Is Not Unconstitutional

In addition to challenging her deportation order, the petitioner also challenges the duration of her detention by ICE.³ Although it is not explicit, the petitioner appears to argue that her detention violates her rights under the Due Process Clause of the United States Constitution because there is no significant likelihood of her removal in the reasonably foreseeable future, in violation of *Zadvydas v. Davis*, 533 U.S. 678 (2001). This contention lacks merit.

1. Legislative Framework

Where, as here, a final order of removal has been entered against an alien, the government has an obligation to facilitate the alien's removal within a 90-day removal period. See 8 U.S.C. § 1231(a)(1). During this period, the government must detain that alien until he or she is actually removed. See 8 U.S.C. § 1231(a)(2). Under 8 U.S.C. § 1231(a)(1)(B), the "removal period" begins on the latest of the following events:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

8 U.S.C. § 1231(a)(1)(B).

2. *Zadvydas v. Davis*, 533 U.S. 678 (2001)

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), two resident aliens challenged the constitutionality of their detentions under 8 U.S.C. § 1231(a)(6) because, although no country was willing to accept them, the government continued to hold them years after the expiration of the 90-day removal period. See *Zadvydas*, 533 U.S. at 684-86. The Court stated that, "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem" under the Fifth Amendment of the United States Constitution. *Id.* at 690. Applying the constitutional avoidance doctrine in order

³Courts have held that the REAL ID Act does not eliminate a district court's jurisdiction to review a habeas petition challenging the length of an alien's detention. See, e.g., *Ferry v. Gonzales*, 457 F.3d 1117, 1131 (10th Cir. 2006); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075 (9th Cir. 2006) ("By its terms, the jurisdiction-stripping provisions [of the REAL ID Act] does not apply to federal habeas corpus petitions that do not involve final orders of removal.").

1 to avoid this potential problem, the Court held that 8 U.S.C. § 1231(a)(6), “read in light of the
2 Constitution’s demands, limits an alien’s post-removal-period detention to a period reasonably
3 necessary to bring about that alien’s removal” and “does not permit indefinite detention.” *Id.* at
4 689. The Court stated that, “once removal is no longer reasonably foreseeable, continued
5 detention is no longer authorized” by 8 U.S.C. § 1231(a)(6). *Id.* at 699.

6 The Court concluded that it is presumptively reasonable for the government to detain an alien
7 for 180 days while it attempts to execute the alien’s removal order. Following that 180-day
8 period, an alien may seek release from custody by demonstrating that his or her removal is not
9 significantly likely in the reasonably foreseeable future. *Id.* at 701. If the alien meets this burden,
10 the government must respond with evidence sufficient to rebut the alien’s showing. *Id.* If it is not
11 significantly likely that the alien will be removed within the reasonably foreseeable future, the
12 alien may bring a habeas petition after the six-month period and the court may order him or her
13 released, subject to conditions set by the Attorney General. *Id.*

14
15 3. The Petitioner’s Removal is Significantly Likely in the Reasonably Foreseeable Future

16 Here, although the petitioner has been detained for more than 180 days, there is a significant
17 likelihood of the petitioner’s removal in the reasonably foreseeable future. Accordingly, the
18 petitioner’s detention is not in violation of her Due Process rights.

19 As an initial matter, although the petitioner was taken into custody by ICE on January 17,
20 2007, and has been detained since that time, *see* Grinberg Declaration ¶ 3, the government was
21 prevented from executing her deportation order when the petitioner filed a motion to reopen her
22 deportation proceedings on or about March 7, 2007, *see* Grinberg Declaration a Exhibit B. The
23 government was prevented from executing her deportation order when the petitioner filed a motion
24 to reopen her deportation proceeding because, under 8 C.F.R. § 1003.23(b)(1)(v), an alien who
25 files motion to reopen a proceeding in which an *in absentia* removal order was entered (as here)
26 automatically receives a stay of removal. This stay of removal continued in effect until the United
27 States Court of Appeals for the Fifth Circuit denied the petitioner’s motion for a stay of
28 deportation on August 15, 2007. *See* Habeas Petition at Exhibit 6.

1 A number of courts have held that a stay of removal interrupts the 90-day removal period under
2 8 U.S.C. § 1231(a)(1)(B). *See Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 n.4 (11th Cir. 2002)
3 (citing 8 U.S.C. § 1231(a)(1)(B) and stating that the alien interrupted the temporal running of the
4 removal period by moving for and obtaining a stay of deportation); *Lawrence v. Gonzales*, 446
5 F.3d 221, 227 (1st Cir. 2006) (holding that an alien's continued post-order detention past the 90-
6 day removal period was permissible where it "occurred pursuant to his own procuring of stays
7 incident to his legal challenges to the removal order"); *Evangelisa v. Ashcroft*, 204 F. Supp. 2d 405,
8 409 (E.D.N.Y. 2002) (stating that alien's reliance on *Zadvydas* was "disingenuous" when the sole
9 reason he is being held is his requested stay of deportation); *see also* 8 U.S.C. § 1231(a)(1)(C)
10 (stating an alien may remain detained if he or she acts to prevent his of her removal).

11 Thus, it is the petitioner, not the government, who has acted to prevent her removal from the
12 United States by filing a motion to reopen with the Immigration Judge, by filing an appeal of the
13 Immigration Judge's denial with the BIA, by filing a motion to reconsider with the BIA from the
14 BIA's affirmance of the Immigration Judge's denial of her motion to reopen, and by filing a
15 petition for review with the United States Court of Appeals for the Fifth Circuit. It is certainly
16 within the petitioner's rights to pursue these remedies, but she cannot simultaneously complain
17 that her detention violates her rights under the Due Process Clause because it is "indefinite."

18 Moreover, this is not a case like *Zadvydas*, in which the aliens were being detained because
19 no country was willing to accept them. Here, the petitioner's removal is imminent. The United
20 States Court of Appeals for the Fifth Circuit has denied the petitioner's motion for a stay of
21 deportation, and the ICE has recently (on September 20, 2007) asked the Honduran Consulate to
22 issue a travel document, which will allow the petitioner's repatriation to Honduras. *See*
23 Attachment to this Opposition. In ICE's letter to the Honduran Consulate, the Assistant Field
24 Office Director notes that the Honduran Consulate had previously issued a travel document, but
25 that ICE was unable to use the document before its expiration due to the petitioner's continued
26 activity in her removal proceedings. *See id.* When the Honduran Consulate issues a renewed
27 travel document, the ICE will promptly remove the petitioner to Honduras. *See id.*

Date: September 28, 2007

Respectfully submitted,

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